(2)

No. 06-837

IN THE

Supreme Court of the United States

OLD STONE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America is the world's largest federation of business organizations. It represents more than three million businesses of every size, in every business sector, and from every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national importance to American business.

The Federal Government's rights and obligations as a contracting party is such an issue. Over the years the Chamber has filed *amicus* briefs in numerous cases involving this subject, including *United States v. Winstar Corp.*, 518 U.S. 839 (1996). The instant appeal, a post-*Winstar* breach of contract case, has ramifications for government contractors, and more generally companies that participate in government programs, well beyond the savings and loan context. This is because the Federal Circuit's opinion, contrary to the Court's holding in *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000), sharply curtails the availability of the traditional remedy of restitution when the Government materially breaches a contract. This Court's holdings on Government liability for breach of contract are meaningless if the Federal Circuit is unwilling to impose proper remedies for breach.

SUMMARY OF ARGUMENT

This case raises the question of whether the Federal Government is entitled to special treatment, and can avoid traditional remedies such as restitution, when it breaches a con-

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[1] No counsel for a party has authored this brief in whole or part, and no person or entity, other than the Chamber, its members, and its counsel, has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief, and the letters confirming consent have been submitted to the Clerk's office.

tract. The Court long has held that when the Government enters into a contract, it is governed by the same law applicable to contracts between private parties. It is in the Government's own interest to be a reliable contracting partner, which means fulfilling its contractual obligations or being subject to standard contract law remedies when it does not. This interest is especially compelling in the case of "regulatory contracts," where, as in the *Winstar* cases, the Government has relied upon private contractors to achieve statutory goals.

The Federal Circuit, however, repeatedly has afforded the Government special treatment by creating inequitable limitations on the availability of remedies for breach of contract. In post-*Winstar* and other kinds of regulatory contract cases, the Federal Circuit has repeatedly rejected lost-profits expectancy damages and severely limited reliance damages; now the Federal Circuit essentially has made restitution unavailable as well. More specifically, the decision below is inconsistent with two principles articulated in *Mobil Oil*—that a waiver of restitution for substantial breach requires accepting "significant postrepudiation performance" from the breaching party, 530 U.S. at 623, and that a victim of substantial breach is entitled to restitution even if it would have lost money had the contract been performed, *id.* at 608, 623-24.

Restitution for substantial breach simply gives the plaintiff its money back. It is an important remedial option, simpler to measure than any form of damages, and fundamentally fair. But in its decision below the Federal Circuit has eliminated restitution by reviving a version of the election-of-remedies doctrine that this Court condemned as "harsh" and "obsolete" nearly a century ago. *Friederichsen v. Renard*, 247 U.S. 207, 213 (1918). Modern election-of-remedies doctrine focuses on the functional choice between remedies that demand performance, or the value of performance, from the breaching party and remedies that reverse the transaction and return to

each side what it received from the other. Under modern formulations of the doctrine, Petitioner Old Stone did not elect a remedy. Old Stone did not have any real choice, because the Government directed Old Stone's course of action, and because no remedy other than restitution was actually available. Mitigation of damages (which should be encouraged, not discouraged) is not inconsistent with any other remedy that might have been available. Old Stone neither requested nor received any post-breach performance from the Government, nor did the Government rely on an apparent choice in any other way. Yet the Federal Circuit denied Old Stone restitution. This Court should review and reverse this misuse of the election-of-remedies doctrine and restore restitution as an important and equitable remedy available to contractors when the Government commits a substantial breach.

ARGUMENT

I. THIS COURT SHOULD CORRECT THE FEDERAL CIRCUIT'S PERSISTENT SPECIAL TREATMENT OF THE GOVERNMENT IN BREACH OF CONTRACT CASES

This Court held in *Lynch v. United States*, 292 U.S. 571, 579 (1934), and repeated in *Winstar*, 518 U.S. at 895, and in *Mobil Oil*, 530 U.S. at 607, that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *See also Winstar*, 518 U.S. at 896 n.39 (citing more cases, including *Perry v. United States*, 294 U.S. 330, 352 (1935) ("When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference except that the United States cannot be sued without its consent.")). A concurring opinion in *Winstar* quoted the Court's statement that "'[t]he United States are as much bound by their contracts as

are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.'" *Winstar*, 518 U.S. at 912 (Breyer J. concurring) (quoting the *Sinking Fund Cases*, 99 U.S. 700, 719 (1878)).

In this case, the Federal Circuit *again* has flouted this crucial principle and devised restrictive remedy rules that conflict with basic contract law, give the Government special treatment, and deprive government contractors of a well-established remedy—in this case, restitution—that would be available under the law applicable to private parties. This Court's liability rulings against the United States are seriously undermined by the Federal Circuit's constricted rules on available remedies, which embolden the Government to breach its contracts rather than act as a "reliable contracting partner." *Winstar*, 518 U.S. at 883.

A. There Are Compelling Reasons Why The Government Should Not Be Afforded Special Treatment When It Breaches A Contract

The Government can and does impose limitation-of-remedy clauses when necessary to its interests. For example, many government contracts contain termination-for-convenience clauses that permit the Government to terminate the contract and pay limited compensation. *See* 48 C.F.R. §§ 52.249-1 to 249-7 (2005); *see generally G.L. Christian & Assocs. v. United States*, 312 F.3d 418 (Ct. Cl. 1963). When the Government demands such a clause, its prospective contract partners can adjust their own pricing, planning, and willingness to contract. But, where, as here, neither Congress nor the Executive Branch found it in the Government's interest to require such a clause, courts should not retroactively impose their own limitations on remedies.

If the Government breaches a contract without a provision for special or limited remedies, then the Government must be

held to the same contract remedies as private parties because of "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transaction of its agencies." *Winstar*, 518 U.S. at 883. This Court in *Winstar* recalled Justice Brandeis's recognition that "'[p]unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors.' *Lynch v. United States*, 292 U.S., at 580." 518 U.S. at 885. It is critically important that the Court review the Federal Circuit's restitution holding in this case, which is contrary to these principles.

B. There Is A Heightened Public Interest In Ensuring That The Government Is Subject To Traditional Contract Remedies When It Breaches A "Regulatory Contract"

The Government frequently enters into "regulatory contracts" with the private sector in order to "further its regulatory goals through contract." *Winstar*, 518 U.S. at 886. These regulatory contracts are prescribed by statutes and their implementing regulations. In the past, the United States has entered into regulatory contracts related to important subjects such as tribal health services, off-shore oil exploration, rescue of failed savings and loans, storage of spent nuclear fuel, production of alternative fuels such as ethanol, extraction of helium, creation of public housing, and many other subjects. *See Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 634 (2005); *Mobil Oil*, 530 U.S. at 609, 614; *Winstar*, 518 U.S. at 894; *Ind. Mich. Power Co. v. United States*, 422 F.3d 1369, 1372 (Fed. Cir. 2005); *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1015 (Fed. Cir. 1996); *Northern Helex Co. v. United States*, 455 F.2d 546, 548 (Ct. Cl. 1972); *Statesman II Apartments, Inc. v. United States*, 66 Fed. Cl. 608, 610-11 (2005). In the future, the Government may rely upon private contractors to accomplish broad statutory objectives in areas such as nuclear power, social security reform,

health care reform, and environmental protection. For example, in the spent nuclear fuel context alone, contractors may face losses of up to $50 billion if the Government breaches its contracts by failing to open a permanent nuclear repository. Marcia Coyle, *Nuclear-Fuel Lawsuits Spawn Damage Award Fallout*, Nat'l L.J., Aug. 23, 2006. Thus, the Supreme Court's guidance on appropriate remedies, including restitution, for Government breach of regulatory contracts is needed both in the *Winstar* context and beyond.

Allowing the Federal Circuit to create special remedy rules in regulatory contract cases (apparently devised to protect a short-sighted view of the interests of the public fisc) will have "the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." *Winstar*, 518 U.S. at 884. *Winstar* underscored the importance of protecting contractors who enter into regulatory contracts with the Government, stating that because the "Government may wish to further its regulatory goals through contract, we are unwilling to adopt any rule of construction that would weaken the Government's capacity to do business . . ." *Id.* at 886. If remedies are curtailed without fair notice in the contract itself, contractors will either refuse to contract with the Government or charge a higher price to cover the risk of uncompensated losses. *Cf. Boyle v. United Technologies Corp.*, 487 U.S. 500, 511-512 (1988) ("The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs.").

There is a particular public interest in applying the rules on mitigation of damages to Government breaches: The United States generally will have less liability if the contractor mitigates the harm caused by the breach. In the *Winstar* context, contractor mitigation efforts saved a number of failed thrifts,

and thus reduced the Government's liabilities.[2] Although contractors should be *rewarded* for reasonable efforts to mitigate, the decision below *penalizes* mitigation by treating it as a fatal election of remedy.

II. THE DECISION BELOW SERIOUSLY UNDERMINES *WINSTAR*'S LIABILITY HOLDING

The Federal Circuit has progressively limited the remedies available in post-*Winstar* cases. Now, the decision below appears to preclude substantially all restitution claims in *Winstar* cases not yet litigated to judgment. Following its breach of the *Winstar* contracts, the Government *insisted* that acquiring institutions continue to operate the failed thrifts they had acquired, and that they infuse new capital to replace the supervisory goodwill abolished by Congress. Now, in a classic "Catch-22," the decision below holds that compliance with this command was an "election of remedy" that precludes restitution. Pet. App. 18a. Because the Government issued this command to all or nearly all the acquiring thrifts, all of them will be held to have "elected" their remedy.

This opinion eliminating the restitution remedy follows earlier cases that express extreme skepticism about the ability to recover lost-profits expectancy damages. The attraction of these contracts for the acquiring thrifts was that the promised period for amortizing supervisory goodwill would allow ample time to restore the acquired thrifts to financial health, and that the acquired thrifts could then be operated at a profit indefinitely into the future. Often, as in this case, the acquisition opened new opportunities for profitable expansion. Pet. App. 33a-34a. But the Federal Circuit has held that expected profits are generally so speculative that trying to recover them has repeatedly proved "a waste of time;" this

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[2] *See, e.g., LaSalle Talman, F.S.B. v. United States*, 462 F.3d 1331, 1334 (Fed. Cir. 2006) (breach left thrift "[o]n the brink of federal receivership," but since mitigation, it "has remained a viable business").

includes lost profits from assets an acquiring thrift is forced to sell to restore capital ratios destroyed by the Government's breach. *Cal. Fed. Bank v. United States*, 395 F.3d 1263, 1270 (Fed. Cir. 2005); *see also Glendale Fed. Bank v. United States*, 378 F.3d 1308, 1313 (Fed. Cir. 2004). Further, specific performance is unavailable because Congress prohibited the Government from performing these contracts. That legislation effected a material breach, making the Government liable for monetary remedies, but it precluded specific performance. *See Winstar*, 518 U.S. at 868-70.[3]

The Federal Circuit held in this case that even reliance damages are unavailable. In a tortured holding not presented for review in Old Stone's petition, the Federal Circuit held that the Government could not foresee that its breach could cause the loss of Old Stone's investment, Pet. App. 27a, even though that breach rendered Old Stone instantly out of regulatory compliance, *id.* at 40a, 79a. Full compensatory damages in this case would include the value of the healthy businesses Old Stone lost, either sold off at fire-sale prices, *id.* at 40a, 43a-46a, or merged with the acquired thrifts and ultimately seized by the Government, *id.* at 36a, 46a, plus the expected profits Old Stone never earned from the acquired thrifts. The modest restitution remedy actually sought would cover only a small fraction of these losses, but the court below denied even that.

We do not claim that the Federal Circuit—in the past— has wholly refused to enforce *Winstar*. Some financial institutions won restitution judgments prior to the decision below, *see, e.g., Landmark Land Co., Inc. v. FDIC*, 256 F.3d 1365 (Fed. Cir. 2001), although it is now hard to see how that ever could happen again if the opinion below is allowed to stand.

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[3] Specific performance is rarely available against the Government in any event, because of doubts about the scope of Congress's waiver of sovereign immunity. *See Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1, 3 (1st Cir. 1989) (collecting cases).

Even in this case, the Federal Circuit affirmed an award for the cost of reasonable efforts to mitigate damages, but that award is far less than either the losses Old Stone suffered or the assets it transferred to the acquired thrifts (and thus to the Government when it seized the bank into which those thrifts had been merged).

But the decision below does represent a further step in a series of Federal Circuit decisions that have systematically curtailed the principal remedies for breach in *Winstar*, and by extension, other government contract cases: no specific performance, few if any lost-profits expectancy damages, severely limited reliance damages, and now, no restitution. The Court should review this judgment to ensure that *Winstar* liability is not fatally undermined by the progressive elimination of effective remedies for government breach of contract in *Winstar* and other regulatory contract cases.

III. THE DECISION BELOW SQUARELY CONFLICTS WITH *MOBIL OIL*

The Federal Circuit's curtailment of restitution is particularly troublesome because in *Mobil Oil* this Court held that one remedy available to a victim of a substantial breach of a government contract is restitution of "'any benefit'" conferred on the Government by "'part performance or reliance.'" 530 U.S. at 608 (quoting *Restatement (Second) of Contracts* § 373 (1981) (hereinafter *Rest. Contracts*)). The Court further held that a victim of breach does not waive this right by continuing to perform its side of the contract unless it receives "significant postrepudiation performance" from the breaching side. 530 U.S. at 623. And the Court held that a victim of breach may recover restitution even if it would have lost money had the contract been performed. *See id.* at 608, 623-24. The decision below is squarely inconsistent with both the second and third of these holdings in *Mobil Oil*.

A. The Decision Below Conflicts With *Mobil Oil's* Standard For Election Of Remedies

The Federal Circuit held that Old Stone had elected its remedy, and thus waived its right to restitution, even though Old Stone received *no* performance from the Government at any time after the Government repudiated the contract. The court held that the Government's reliance on Old Stone's delay in terminating the contracts or suing for restitution was enough to bar Old Stone's claim. Pet. App. 18a. The court failed to recognize that continued performance by the Government is not an alternative to detrimental reliance; it *is* detrimental reliance. When a victim of breach says that it is still demanding performance and will seek remedies based on the value of performance, the response that relies on that representation is to perform or to pay the value of performance. *Mobil Oil* requires "significant postrepudiation performance" (530 U.S. at 623) because the relevant detrimental reliance is substantial action directly responsive to the breach victim's demand for further performance.

The Federal Circuit suggested that *Mobil Oil* is ambiguous on whether significant postrepudiation performance is actually required. Pet. App. 17a-18a. To the contrary, *Mobil Oil* is clear; the Federal Circuit simply refused to follow it. Regardless of whether the court of appeals rejected *Mobil Oil*, seriously misread it, found an important ambiguity in it, or identified an unresolved issue at the edges of it, the decision below presents an important question about the meaning of *Mobil Oil* that only this Court can resolve for the benefit of both the Government and government contractors.

B. The Decision Below Conflicts With *Mobil Oil's* Holding On Restitution In Excess Of Expectancy

Mobil Oil also held that a victim of substantial breach may recover restitution even if it would have lost its entire investment had the contract been fully performed. 530 U.S.

at 608, 623-24. "Because the Government repudiated the lease contracts, the law entitles the companies to that restitution whether the contracts would, or would not, ultimately have produced a financial gain . . ." *Id.* at 623-24.

The decision below is flatly inconsistent with this holding. Completely ignoring *Mobil Oil*, the Federal Circuit denied restitution because "'the non-breaching party should not be placed in a better position through the award of damages than if there had been no breach.'" Pet. App. 27a (quoting *Bluebonnet Savings Bank, F.S.B. v. United States*, 339 F.3d 1341, 1345 (Fed. Cir. 2003)). This is true "of damages" in the proper sense of that term—of expectancy and reliance damages measured by plaintiff's loss. But as *Mobil Oil* squarely holds, it is not true of restitution, which is measured by benefits conferred on defendant.

Simple refund cases show why *Mobil Oil* was right and the Federal Circuit's proposed rule would be absurd. The classic citation is *Bush v. Canfield*, 2 Conn. 485 (1818), where buyer paid a large deposit for flour and seller failed to deliver. The contract price was $7 per barrel, but by the time of delivery, the market price had dropped to $5.50 per barrel. Arguing that buyer could not recover more than his expectancy, seller sought to retain $1.50 for every barrel he failed to deliver. Not surprisingly, the court disagreed.

Bush v. Canfield vividly illustrates a point of general importance: When a victim of substantial breach seeks restitution, either he received nothing from the breaching party or he has returned whatever he did receive. To give the victim less than a full refund is necessarily to let the breaching party retain a payment for nothing. Here, the Government reneged on its most critical promise, and it took back the bank that had received the failed thrifts and its assistance payments. Old Stone ultimately received nothing from the Government but the destruction of its business. Even on the counterfactual assumption that it would have lost money if the contract had

been performed, Old Stone is entitled to its money back. This Court should grant certiorari to clarify and enforce its precedent in *Mobil Oil*.

IV. THE DECISION BELOW CONFLICTS WITH BASIC PRINCIPLES OF THE LAW OF CONTRACTS AND OF RESTITUTION

On an even more fundamental level, the Federal Circuit's opinion does far more damage than some minor error in the administration of a highly technical doctrine. To understand the profound nature of the Federal Circuit's errors, it is useful to review the remedy of rescission and restitution from the ground up, and how the well-established principles surrounding that remedy apply to this case.

A. A Victim of Substantial Breach Is Entitled To Restitution Of The Price

If a party to a contract pays in advance and does not get what he paid for, it is both common sense and settled law that he is entitled to his money back. He does not forfeit this right by attempting to mitigate damages, nor does he lose this right if it turns out that he was overcharged and would have lost money if the contract had been performed. Neither of these circumstances is a reason to permit the breaching party to retain full payment for a broken promise.

With respect to common law contracts, this right is summarized in *Rest. Contracts* § 373 ("injured party is entitled to restitution for any benefit that he has conferred on the other party"), and *Restatement (Third) of Restitution and Unjust Enrichment* § 37 (Tentative Draft No. 3, 2004) (hereinafter *Rest. Restitution*) ("decree of rescission may require the defendant (a) to make specific restitution of property transferred under the contract; (b) to repay amounts received on account of the contract price; and (c) to pay incidental

damages to which the plaintiff would otherwise be entitled").[4] In contracts for the sale of goods, this right is codified in § 2-711(1) of the Uniform Commercial Code (2005).

This case is more complex than a contract for the sale of flour, but no different in principle. The promise that Old Stone could count "supervisory goodwill" toward its capital requirements was "the principal inducement for these supervisory mergers," *Winstar*, 518 U.S. at 848, "critical to make the transaction possible in the first place," *id.* at 850. It was "an essential part of the *quid pro quo*" and a "*sine qua non* of [the contractors'] assent." *Id.* at 921 (Scalia, J., concurring). Without this accounting treatment, "in most cases the institution resulting from the transaction would immediately have been insolvent." *Id.* at 850 (plurality opinion). When the Government banned the accounting treatment it had promised, the impact on acquiring institutions "was swift and severe." *Id.* at 857. In this case and many others, the Government's breach led to regulatory insolvency and to seizure of the assets of the party that had contracted with the Government. The trial court found that Old Stone would have survived but for the breach, Pet. App. 76a, 97a, and that the breach was "total," *id.* at 88a-91a, 96a. The Federal Circuit did not disturb these findings.

The price that Old Stone paid to acquire the failing thrifts consisted principally of its large contributions to the capital of those thrifts. Those contributions to capital, together with everything else Old Stone received from the Government, were delivered to the Government when it seized Old Stone's remaining assets. Having suffered a total breach, and having

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[4] The membership of the American Law Institute has approved this draft, subject to "editorial comments" and the discussion from the floor. *See Proceedings of the 81st Annual Meeting of The American Law Institute* at 259-60 (2004). In the referenced discussion, no member questioned any part of the substance of § 37. *See id.* at 252-55.

returned the rest of what it received from the Government, Old Stone is entitled to restitution of the amounts it paid.

B. Rescission And Restitution Is An Important Remedial Option For Victims Of Breach

"The justification for the rescission remedy combines remedial economy and elementary fairness to the plaintiff." *Rest. Restitution* § 37, comm. b. at 306. Refund of the price is simple and easily quantified, presenting no issues of causation or valuation and no counterfactual questions of what would have happened but for the breach. The value of Old Stone's contributions to the capital of the failed thrifts was undisputed: Pet. App. 58a n.23, 80a, 97a. Restitution's simplicity leads victims of substantial breach to elect restitution when it is impossible, too difficult, or too expensive to prove damages.

A victim of breach might also elect restitution because it "has lost confidence in defendant and the transaction," or because "personal preferences not reflected in market values" make damages undercompensatory. Douglas Laycock, *Modern American Remedies* 624 (3d ed. 2002). Finally, some plaintiffs might elect rescission because they would have lost money if the contract had been performed. For such plaintiffs, restitution would yield a larger recovery than damages, because either reliance or expectancy damages might be reduced by plaintiff's expected loss on the contract. (For this limit on reliance, *see Rest. Contracts* § 349.) There is no evidence that such an outcome would have obtained in the instant case.

This array of reasons for choosing rescission and restitution make it an important remedial option for victims of substantial breach, *including* government contractors. To limit sharply the availability of restitution in government contract cases is a serious departure from the principle that contract remedies against the Government "are governed generally"

by the same law as private contracts. The Federal Circuit's election-of-remedies holding is just such a departure.

C. The Decision Below Returns Election Of Remedies To Its Former Status As A Technical Trap For Unwary Breach Victims

Under the writ system, alternative remedies for breach of contract were pursued with different writs, sometimes even in different courts. Election-of-remedies doctrine became embroiled in conceptual technicalities and led to claims that plaintiffs had irrevocably elected worthless remedies. The whole doctrine became the subject of intense criticism by scholars and courts, including this Court and its greatest common-law judges. *See Friederichsen v. Renard*, 247 U.S. at 213 ("At best this doctrine of election of remedies is a harsh, and now largely obsolete rule"). Both Justice Holmes and Justice Cardozo denounced the use of election-of-remedies doctrine to hold plaintiffs to a claimed election of a remedy on which no recovery could be had, saying that "[t]here would be no sense or principle in such a rule." *Schenck v. State Line Tel. Co.*, 144 N.E. 592, 593 (N.Y. 1924) (Cardozo, J.) (quoting *Snow v. Alley*, 30 N.E. 691, 692 (Mass. 1892) (Holmes, J.)). Yet that senseless rule is exactly what the Federal Circuit applied here.

The reformed election-of-remedies doctrine that emerged from this criticism is functional, not technical. It has four elements that are relevant here: more than one remedy must be *actually available*; plaintiff must manifest a *choice of a remedy*; the chosen remedy must be *inconsistent* with the remedy later claimed; and defendant must *materially rely* on the initial choice. In the succinct formulation of the Restatement's black letter:

> *If* a party has more than one remedy under the rules stated in this Chapter, his manifestation of *a choice of one of them* by bringing suit or otherwise is *not* a bar to another remedy *unless* the remedies are inconsistent *and*

> the other party materially changes his position in reliance on the manifestation.

Rest. Contracts § 378 (emphasis added).[5] The Federal Circuit ignored most of these requirements and reverted to a version of the technical election doctrine that this Court condemned as "harsh" and "obsolete" nearly a century ago.

1. The Remedies Must Be Functionally Inconsistent. Rescission and restitution seeks to unwind the contract and move the parties back toward the situation before the contract was made. Each side must return what it received from the other. *Rest. Contracts* § 384. This remedy is genuinely inconsistent only with forward-looking remedies that would put the plaintiff in as good of a position as if the contract had been performed. Plaintiff may plead in the alternative and delay the choice too late in the litigation, *id.* at § 378, comm. a. at 229, but sooner or later he must choose. This is a real choice between different outcomes; it is not a technicality.

If the Government could have been held liable for specific performance or full (lost-profits) expectancy damages, Old Stone would have had to choose. It could choose a forward-looking remedy, suing for what it would have earned if the contract had been performed, or it could choose the backward-looking remedy, returning what it received from the Government and suing to get its money back. If it returned the acquired thrifts and sued for a refund, it could not sue for its expected profits from the contract; if it kept the acquired thrifts, the value of what it retained would have to be

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[5] The phrase "election of remedies" is also used to describe more straightforward rules: Plaintiff cannot get a double recovery, and a judgment may be claim or issue-preclusive in a suit for a different remedy for the same breach. Laycock, *Modern American Remedies* 637-39. These situations are not plausibly at issue here. The Federal Circuit's suggestion that recovery of the $118 million invested before the breach would duplicate recovery of the additional $74 million invested after the breach, Pet. App. 27a, is absurd on its face.

credited against any damages.[6] Old Stone, however, never had the opportunity to elect a remedy.

2. The Victim of Breach Must Manifest a Choice *of Remedy*. In a world outside the writ system, this necessity to choose between functionally inconsistent remedies is the only legitimate basis for election-of-remedies doctrine. This basis for the doctrine also indicates its proper scope—indeed, virtually defines its scope. If the victim of breach successfully demands that the breaching party resume or continue performance, it would be inconsistent to then reverse course and demand rescission and restitution. Similarly, if the victim successfully demands his money back, it would be inconsistent to then demand performance or expectancy damages. This is the underlying explanation for this Court's holding in *Mobil Oil* that "waiver" of the right to restitution requires "acceptance of performance under a once-repudiated contract." 530 U.S. at 622.

Old Stone did nothing following the Government's breach that manifested a choice of remedy. Old Stone did *not* demand further performance, which would have been futile in the face of a statutory ban on the only performance still due. What Old Stone did was to operate the acquired thrift and to infuse capital to meet the new regulatory requirements. For multiple reasons, neither of these steps indicated a choice of one remedy over others.

First, government regulators demanded that Old Stone take these steps. Pet. App. 40a & n.9, 66a & n.28, 82a-83a. Complying with the Government's regulatory demands manifested no choice because Old Stone had no choice. This presents an

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[6] Reliance damages are an in-between case, but may also require an ultimate election. Reliance damages drop expected profit from the measure of recovery; they may or may not be accompanied by steps to reverse the transaction. In this case, Old Stone could recover its initial investment in the failed thrifts either as restitution or as reliance, but of course it could recover only once. Pet. App. 96a.

issue of broad importance in regulatory contracts; the Government is often in position to back its contract demands with regulatory demands, and the response to such demands is not an election of remedy.

Even if Old Stone had a choice, operating the failed thrifts and infusing new capital would not manifest a choice *of remedy*, because these acts were consistent with suing either for restitution or for expectancy damages when Old Stone eventually sued. If Old Stone had refused to operate the thrifts or infuse new capital (and if it had somehow made that refusal effective despite the Government's threat of civil penalties and cease-and-desist orders, *id.* at 40a n.9), the result would have been prompt seizure of the failed thrifts and immediate loss of Old Stone's investment to that point. In the event of litigation, that lost investment (the $118 million at issue here) would be a principal item of recovery whether Old Stone sought restitution or expectancy or reliance. It would be recoverable in restitution because it was money Old Stone had paid to the benefit of the Government; it would be recoverable in expectancy because expectancy would include both the losses Old Stone expected not to suffer and the profits it expected to earn; it would be recoverable in reliance because it was money spent in reliance on the contract. But Old Stone could potentially avoid this loss by investing new capital and continuing to operate. These efforts to mitigate were equally consistent with any remedy and inconsistent with none, and thus, they manifested no choice among inconsistent remedies.

The Federal Circuit ignored the question whether anything Old Stone had done was functionally inconsistent with its later choice of remedy. It simply said that Old Stone's continued operation treated the contract as still in effect, and that this was inconsistent with restitution. This claim of conceptual inconsistency, without regard to any functional inconsistency, is a return to election-of-remedies doctrine as a

conceptual formalism, and it is mistaken at every step. What the Federal Circuit here characterized as continued performance could also be characterized—and was characterized, even by the Federal Circuit, *id.* at 13a-14a—as mitigation of damages. Mitigation implied nothing about whether the contract was still in effect, because mitigation was equally reasonable under any remedy.

Of course there was a risk that Old Stone's mitigation efforts would make things worse instead of better. But that risk is directly addressed by mitigation doctrine, which requires the court to determine whether unsuccessful efforts to mitigate were reasonable. Both courts below held that those efforts were reasonable. *Id.* at 14a, 82a-83a. If Old Stone's mitigation efforts had been *un*reasonable, and if those efforts left the failed thrifts in significantly worse condition than when Old Stone received them from the Government (at a time when they had just been seized for insolvency), then there would have been a basis to refuse restitution on the ground that Old Stone had unreasonably run down the value of the assets it was returning to the Government. But to refuse restitution because of reasonable efforts to mitigate is to penalize all mitigation. In the long run, such a rule can only increase aggregate losses to both the Government and its contractual partners.

3. The Elected Remedy Must Be Available. Election-of-remedies doctrine applies only "[i]f a party has more than one remedy" available. *Rest. Contracts* § 378. "A party is not precluded from pursuing other remedies by the fact that he has made a mistaken attempt to obtain a remedy that is not available to him, even if his original choice has been relied on by the other party." *Id.*, comm. c. at 229-30. As discussed above, neither specific performance nor full expectancy damages is available in post-*Winstar* cases. With respect to the $118 million at issue in the dispute over election-of-remedies, the Federal Circuit held that even reliance damages were

unavailable. Pet. App. 27a. Even if Old Stone's efforts to mitigate damages *had* manifested a choice to pursue a remedy inconsistent with restitution, that choice would not be binding because no such remedy was available.

4. The Breaching Party Must Detrimentally Rely. With no manifestation of a choice of remedy, there was nothing for the Government to rely on. With no alternate remedy available, reliance would be irrelevant in any event. Moreover, the "detrimental reliance" that the Federal Circuit claimed to find in this case is not remotely comparable to the continued performance required by *Mobil Oil*.

The Federal Circuit indicated that if Old Stone had asserted its claim to restitution sooner, the Government would not have demanded additional capital contributions from Old Stone, would have seized the failed thrift sooner, and would have suffered smaller losses. *Id.* at 19a. None of this speculation has the slightest support in the findings of fact. Refraining from seizing the failed thrift was not reliance at all; it was precisely the course the Government wanted to pursue anyway. *See id.* at 40a & n.9, 66a & n.28, 82a-83a. And any argument about these choices goes only to the reasonableness of Old Stone's efforts to mitigate damages.

There was no inconsistent remedy available, no manifestation of a choice of remedy, and no detrimental reliance; thus, none of the elements of modern election-of-remedies doctrine is satisfied. This Court should review the opinion below not only to reaffirm *Mobil Oil*, but also to confine election-of-remedies doctrine to its modern and functional scope.

CONCLUSION

The petition for writ of certiorari should be granted.

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